

1 KAREN P. HEWITT
2 United States Attorney
3 STEVEN DE SALVO
4 Assistant U.S. Attorney
5 California State Bar No. 199904
6 steven.desalvo@usdoj.gov
7 United States Office Building
880 Front Street, Room 6293
San Diego, California 92101
Telephone: (619) 557-7032
8
9 Attorneys for Plaintiff
10 United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Steven De Salvo, Assistant United States Attorney, and hereby files its response and opposition to motions filed by defendant LAWRENCE DOSS. Said response is based upon this response and opposition, the files and records of the case, and argument.

1 **I.**2 **POINTS AND AUTHORITIES**3 **A. STANDARD DISCOVERY REQUESTS**

4 The United States has provided all written discovery to Defendant. The United States also
 5 has provided all video recorded statements by Defendants and material witnesses.

6 As to the specific discovery and evidentiary requests of Defendant, the Government responds
 7 as follows:

8 1. The Government Will Disclose Information Subject To Disclosure
 9 Under Rule 16(a)(1)(A) and (B) Of The Federal Rules Of Criminal
 Procedure

10 The government will disclose defendant's statements subject to discovery under Fed. R.
 11 Crim. P. 16(a)(1)(A) (substance of defendant's oral statements *in response to government*
 12 *interrogation*) and 16(a)(1)(B) (defendant's relevant written or recorded statements, written records
 13 containing substance of defendant's oral statements *in response to government interrogation*, and
 14 defendant's grand jury testimony).

15 2. The Government Will Comply With Rule 16(a)(1)(D)

16 The defendant has been provided with his or her own "rap" sheet and the government will
 17 produce any additional information it uncovers regarding defendant's criminal record. Any
 18 subsequent or prior similar acts of defendant that the government intends to introduce under Rule
 19 404(b) of the Federal Rules of Evidence will be provided, along with any accompanying reports,
 20 at the reasonable time in advance of trial.

21 3. The Government Will Comply With Rule 16(a)(1)(E)

22 The government will permit defendant to inspect and copy or photograph all books, papers,
 23 documents, data, photographs, tangible objects, buildings or places, or portions thereof, that are
 24 material to the preparation of defendant's defense or are intended for use by the government as
 25 evidence-in-chief at trial or were obtained from or belong to defendant.

26 Reasonable efforts will be made to preserve relevant physical evidence which is in the
 27 custody and control of the investigating agency and the prosecution, with the following exceptions:
 28 drug evidence, with the exception of a representative sample, is routinely destroyed after 60 days,

1 and vehicles are routinely and periodically sold at auction. Records of radio transmissions, if they
 2 existed, are frequently kept for only a short period of time and may no longer be available. Counsel
 3 should contact the Assistant assigned to the case two weeks before the scheduled trial date and the
 4 Assistant will make arrangements with the case agent for counsel to view all evidence within the
 5 government's possession..

6 4. The Government Will Comply With Rule 16(a)(1)(F)

7 The government will permit defendant to inspect and copy or photograph any results or
 8 reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof,
 9 that are within the possession of the government, and by the exercise of due diligence may become
 10 known to the attorney for the government and are material to the preparation of the defense or are
 11 intended for use by the government as evidence-in-chief at the trial. Counsel for defendant should
 12 contact the Assistant United States Attorney assigned to the case and the Assistant will make
 13 arrangements with the case agent for counsel to view all evidence within the government's
 14 possession.

15 5. The Government Will Comply With Its Obligations Under Brady v.
 16 Maryland

17 The government is well aware of and will fully perform its duty under Brady v. Maryland,
 18 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976) to disclose exculpatory
 19 evidence within its possession that is material to the issue of guilt or punishment. Defendant,
 20 however, is not entitled to all evidence known or believed to exist that is, or may be, favorable to
 21 the accused, or that pertains to the credibility of the government's case. As stated in United States
 22 v. Gardner, 611 F.2d 770 (9th Cir. 1980), it must be noted that:

23 [T]he prosecution does not have a constitutional duty to disclose every bit of
 24 information that might affect the jury's decision; it need only disclose information
 25 favorable to the defense that meets the appropriate standard of materiality.
 26 611 F.2d at 774-775 (citations omitted). See also United States v. Sukumolachan, 610 F.2d 685,
 27 687 (9th Cir. 1980) (the government is not required to create exculpatory material that does not
 28 exist); United States v. Flores, 540 F.2d 432, 438 (9th Cir. 1976) (Brady does not create any pretrial
 privileges not contained in the Federal Rules of Criminal Procedure).

6. Discovery Regarding Government Witnesses

1 a. Agreements. The Government will disclose the terms of any agreements by
 2 Government agents, employees or attorneys with witnesses that testify at trial. Such information
 3 will be provided at the time of the filing of the Government's trial memorandum.^{1/} The
 4 Government will comply with its obligations to disclose impeachment evidence under Giglio v.
 5 United States, 405 U.S. 150 (1972).

6 b. Bias or Prejudice. The Government will provide information related to the bias,
 7 prejudice or other motivation to lie of Government trial witnesses as required in Napue v. Illinois,
 8 360 U.S. 264 (1959).

9 c. Criminal Convictions. The Government has produced or will produce any criminal
 10 convictions of Government witnesses plus any material criminal acts which did not result in
 11 conviction. The Government is not aware that any prospective witness is under criminal
 12 investigation.

13 d. Ability to Perceive. The government will produce in discovery any evidence that the
 14 ability of a government trial witness to perceive, communicate or tell the truth is impaired or that
 15 such witnesses have ever used narcotics or other controlled substances, or are alcoholics.

16 e. Witness List. The Government will endeavor to provide the defendant with a list of
 17 all witnesses which it intends to call in its case-in-chief at the time the Government's trial
 18 memorandum is filed, although delivery of such a list is not required. See United States v.
 19 Dischner, 960 F.2d 870 (9th Cir. 1992); United States v. Culter, 806 F.2d 933, 936 (9th Cir. 1986);
 20 United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant, however, is not entitled to
 21 the production of addresses or phone numbers of possible Government witnesses. See United
 22 States v. Thompson, 493 F.2d 305, 309 (9th Cir. 1977), cert. denied, 419 U.S. 834 (1974). The

25 ¹ As with all other offers by the Government to produce discovery earlier than it is
 26 required to do, the offer is made without prejudice. If, as trial approaches, the
 27 Government is not prepared to make early discovery production, or if there is a strategic
 28 reason not to do so as to certain discovery, the Government reserves the right to
 withhold the requested material until the time it is required to be produced pursuant to
 discovery laws and rules.

1 defendant has already received access to the names of potential witnesses in this case in the
 2 investigative reports previously provided to him.

3 f. Witnesses Not to Be Called. The Government is not required to disclose all evidence
 4 it has or to make an accounting to the defendant of the investigative work it has performed. Moore
 5 v. Illinois, 408 U.S. 786, 795 (1972); see United States v. Gardner, 611 F.2d 770, 774-775 (9th
 6 Cir. 1980). Accordingly, the Government objects to defendant's request for discovery concerning
 7 any individuals whom the Government does not intend to call as witnesses.

8 g. Favorable Statements. The Government has disclosed or will disclose the names of
 9 witnesses, if any, who have made favorable statements concerning the defendant which meet the
 10 requirements of Brady.

11 h. Review of Personnel Files. The Government has requested a review of the personnel
 12 files of all federal law enforcement individuals who will be called as witnesses in this case for
 13 Brady material. The Government has requested that counsel for the appropriate federal law
 14 enforcement agency conduct such review. United States v. Herring, 83 F.3d 1120 (9th Cir. 1996);
 15 see, also, United States v. Jennings, 960 F.2d 1488, 1492 (9th Cir. 1992); United States v.
 16 Dominguez-Villa, 954 F.2d 562 (9th Cir. 1992).

17 Pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) and United States v.
 18 Cadet, 727 F.2d 1452 (9th Cir. 1984), the United States agrees to "disclose information favorable
 19 to the defense that meets the appropriate standard of materiality . . ." United States v. Cadet, 727
 20 F.2d at 1467, 1468. Further, if counsel for the United States is uncertain about the materiality of
 21 the information within its possession in such personnel files, the information will be submitted to
 22 the Court for in camera inspection and review.

23 i. Government Witness Statements. Production of witness statements is governed by
 24 the Jencks Act (Title 18, United States Code, Section 3500) and need occur only after the witness
 25 testifies on direct examination. United States v. Taylor , 802 F.2d 1108, 1118 (9th Cir. 1986);
 26 United States v. Mills, 641 F.2d 785, 790 (9th Cir. 1981)). Indeed, even material believed to be
 27 exculpatory and therefore subject to disclosure under the Brady doctrine, if contained in a witness
 28

1 statement subject to the Jencks Act, need not be revealed until such time as the witness statement
 2 is disclosed under the Act. See United States v. Bernard, 623 F.2d 551, 556-57 (9th Cir. 1979).

3 The government reserves the right to withhold the statements of any particular witnesses it
 4 deems necessary until after the witness testifies. Otherwise, the government will disclose the
 5 statements of witnesses at the time of the filing of the government's trial memorandum before trial,
 6 provided that defense counsel has complied with defendant's obligations under Federal Rules of
 7 Criminal Procedure 12.1, 12.2, and 16 and 26.2 and provided that defense counsel turn over all
 8 "reverse Jencks" statements at that time.

9 7. The Government Objects To The Full Production Of Agents'
 10 Handwritten Notes At This Time

11 Although the government has no objection to the preservation of agents' handwritten notes,
 12 it objects to requests for full production for immediate examination and inspection. If certain rough
 13 notes become relevant during any evidentiary proceeding, those notes will be made available.

14 Prior production of these notes is not necessary because they are not "statements" within the
 15 meaning of the Jencks Act unless they comprise both a substantially verbatim narrative of a
 16 witness' assertions and they have been approved or adopted by the witness. United States v.
 17 Spencer, 618 F.2d 605, 606-607 (9th Cir. 1980); see also United States v. Griffin, 659 F.2d 932,
 18 936-938 (9th Cir. 1981).

19 8. All Investigatory Notes and Arrest Reports

20 The government objects to the defendant's request for production of all arrest reports,
 21 investigator's notes, memos from arresting officers, and prosecution reports pertaining to the
 22 defendant. Such reports, except to the extent that they include Brady material or the statements of
 23 defendant, are protected from discovery by Rule 16(a)(2) as "reports . . . made by . . . Government
 24 agents in connection with the investigation or prosecution of the case."

25 Although agents' reports have already been produced to the defense, the government is not
 26 required to produce such reports, except to the extent they contain Brady or other such material.
 27 Furthermore, the government is not required to disclose all evidence it has or to render an
 28 accounting to defendant of the investigative work it has performed. Moore v. Illinois, 408 U.S.
 786, 795 (1972); see United States v. Gardner, 611 F.2d 770, 774-775 (9th Cir. 1980).

1 9. Expert Witnesses.

2 Pursuant to Fed. R. Crim. P. 16(a)(1)(G), at or about the time of filing its trial memorandum,
 3 the Government will provide the defense with notice of any expert witnesses the testimony of
 4 whom the Government intends to use under Rules 702, 703, or 705 of the Fed. R. of Evidence in
 5 its case-in-chief. Such notice will describe the witnesses' opinions, the bases and the reasons
 6 therefor, and the witnesses' qualifications. Reciprocally, the Government requests that the defense
 7 provide notice of its expert witnesses pursuant to Fed. R. Crim. P. 16(b)(1)(C).

8 10. Information Which May Result in Lower Sentence.

9 Defendant claims that the Government must disclose information about any cooperation or
 10 any attempted cooperation with the Government as well as any other information affecting
 11 defendant's sentencing guidelines because such information is discoverable under Brady v.
 12 Maryland. The Government respectfully contends that it has no such disclosure obligations under
 13 Brady.

14 The Government is not obliged under Brady to furnish a defendant with information which
 15 he already knows. United States v. Taylor, 802 F.2d 1108, 1118 n.5 (9th Cir. 1986), cert. denied,
 16 479 U.S. 1094 (1987); United States v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977). Brady is a rule
 17 of disclosure. There can be no violation of Brady if the evidence is already known to the defendant.

18 Assuming that defendant did not already possess the information about factors which might
 19 affect their respective guideline ranges, the Government would not be required to provide
 20 information bearing on defendant's mitigation of punishment until after defendant's conviction or
 21 plea of guilty and prior to his sentencing date. "No [Brady] violation occurs if the evidence is
 22 disclosed to the defendant at a time when the disclosure remains of value." United States v.
 23 Juvenile Male, 864 F.2d 641 (9th Cir. 1988).

24 **B. LEAVE TO FILE ADDITIONAL MOTIONS**

25 The United States does not oppose Defendant's request for leave to file further motions, so
 26 long as discovery motions are based on discovery not yet received by Defendant.

27 //

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III.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the defendant's motions, except where not opposed, be denied.

DATED: April 7, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ Steven De Salvo

STEVEN DE SALVO
Assistant U.S. Attorney
steven.desalvo@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 08CR0650-JM
Plaintiff,)
v.)
LAWRENCE DOSS (2),) CERTIFICATE OF SER
Defendant.)

IT IS HEREBY CERTIFIED THAT:

I, STEVEN DESALVO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO COMPEL DISCOVERY AND LEAVE TO FILE FURTHER MOTIONS on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

John C. Ellis, Jr.
Federal Defenders
225 Broadway, Suite 900
San Diego, CA 92101
(619)685-8467
Email: john_ellis@fd.org

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 7, 2008

s/ Steven De Salvo
STEVEN DE SALVO